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Supreme Court, U.S.
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No. 00-549

IN THE

Supreme Court of the United States

CEDRIC KUSHNER PROMOTIONS, LTD.,

Petitioner,

v.

DON KING, DON KING PRODUCTIONS, INC.,
DKP CORPORATION and JOHN DOES 1-10,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Brief on the Merits, and there are no amendments to that statement.

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SUMMARY OF ARGUMENT

Respondents' theory of the case is fatally flawed in a variety of fundamental ways.

- Respondents ignore the statutory language and its plain meaning.

- Respondents ignore the holdings and rationale of this Court's prior RICO holdings in *Turkette*, *Reves*, and *Scheidler*.

- Respondents ignore the expressed intent of Congress, that courts construe and apply RICO broadly to achieve its sweeping remedial purposes of ferreting out racketeers who seek to shroud their activities and ill gotten gains behind a cloak of supposedly legitimate enterprise.

Respondents instead rely on policy arguments which more properly should be addressed to Congress[1] and common law principles which have no applicability to this case. The only issue in this case is what the language of Section 1962(c), as enacted, means.

The statute means what it says: that an employee who conducts the affairs of an enterprise through a pattern of racketeering may be liable for a RICO violation. As this Court held in *Reves*, the critical issue is the ability of the employee to operate or manage the enterprise's affairs, not whether doing so is within or without the scope of that employee's

1. The policy arguments and interpretation of legislative history advanced by Respondents are not new. In large part they have been articulated by others and ignored by Congress during the more than 30 years since RICO became law.

duties. Respondents concede that if King acted outside the scope of his authority there could be RICO liability. But the employee who with authority conducts the enterprise's affairs through racketeering is an equally insidious violator. Anyone who conducts an enterprise so as to make it the vehicle of racketeering activity is subject to Section 1962(c). That is precisely what Section 1962(c) seeks to proscribe, (*see Scheidler*), and that is exactly why the judgment under review should be reversed and the complaint reinstated.

ARGUMENT

I. THERE IS NOTHING IN THE PLAIN LANGUAGE OF SECTION 1962(c) OR IN ITS LEGISLATIVE HISTORY THAT INSULATES AN EMPLOYEE ACTING WITHIN THE SCOPE OF AUTHORITY FROM LIABILITY AS A RICO PERSON

A. The Plain Language Of The Statute Does Not Support Any Limitation Based Upon Scope Of Employment

Respondents, who wholly ignore both the plain language of the statute and the imperative that statutory analysis must begin there, do not contest that Mr. King, an individual employee of DKP, is a "person" on whom RICO liability can be imposed. Respondents also do not contest that DKP, a corporation, is capable of being an "enterprise," as that term is statutorily defined, 18 U.S.C. § 1961(4). Instead, Respondents would have courts inquire into a degree of distinctness with a *per se* rule that employees acting within the scope of their corporate duties cannot, as a matter of law, be distinct from their corporate employer. This proposition finds no support in the language or structure of Section 1962(c).

RICO addresses Congressional concern with criminal activity or proceeds being injected into the stream of commerce. The statutory focus is on the racketeer who makes use of an "enterprise" to cloak the receipt or use of racketeering income, or who cloaks the racketeering activity itself by means of acquiring or operating an "enterprise" engaged in interstate commerce. H.R. Rep. No. 91-1549, at 35 (1970), *reprinted in* 1971 U.S.C.C.A.N. 4007, 4010.

RICO is directed at something more profound in its scope and effect than merely punishing the bribe, the fraud, or any of the other individual predicate acts. RICO attacks the use of an enterprise as a shield (i) to invest racketeering revenue (18 U.S.C. § 1962(a)); (ii) which is acquired or maintained by racketeering activity or its illicit gains (18 U.S.C. § 1962(b)); or (iii) which itself is either a victim or a vehicle of perpetrating racketeering activity with a patina of legitimacy (18 U.S.C. § 1962(c)). H.R. Rep. No. 91-1549, at 57, *reprinted in* 1971 U.S.C.C.A.N. at 4033; *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

Whatever else Congress may have intended, it left no doubt that RICO was to "be liberally construed to effectuate its remedial purposes." Pub.L. 91-452, § 904(a), 84 Stat. 947; *Sedima, SPRL v. Imrex Co.*, 473 U.S. 479, 497-98 (1985); *Russello v. United States*, 464 U.S. 16, 27 (1983) (where this Court noted the unusual nature of the legislative directive). This Court has always followed that directive and has resisted artificial limitations not contained in the statutory text. Accordingly, Respondents' efforts to read in agency requirements that do not appear in the statutory language or legislative history should be rejected.

Section 1962(c) is directed at all persons who conduct their employer's affairs through a pattern of racketeering.

The statute does not talk at all about the employee who acts without authority. On the contrary, the power to act is presupposed by the statutory requirement of conducting the affairs of the enterprise.[2] Moreover, as the vehicle of the racketeering activity, the enterprise may also be the beneficiary of the racketeering. The RICO "person" who has the ability to operate or manage the enterprise's affairs also may have the ability to filter the benefits to his or her own advantage.

Restrictions on the statutory sweep based upon scope of employment are unjustified. In this regard, the statutory language is unambiguous: it looks to the employee who uses the corporation or other enterprise as a front for that person's racketeering activity. This includes the enterprise formed and operated only for criminal purposes. Equally within the statutory scope is the enterprise which conducts legitimate business affairs but whose affairs are also conducted by an employee through a pattern of racketeering. *United States v. Turkette*, 452 U.S. 576, 587 (1981). In each instance the employee who operates the enterprise to inject criminal activity into the stream of commerce is the statutory target.

Certainly Congress could have included in the statute a limitation with regard to employees acting within the scope of their employment. That elastic common law doctrine is well-known to exist. But whereas Congress provided a minimum test in Section 1962(a) regarding level of

2. This is not to say that committing a criminal act is ever conduct within the scope of employment. Nevertheless, it is now settled that corporations can be held criminally liable, and in such circumstances, the individual employee who also commits the criminal act may also be held separately liable without any defense that the criminal conduct was for the benefit of the corporate employer. *Cf. United States v. Wise*, 370 U.S. 405 (1962).

investment, there is no scope of employment limitation in Section 1962(c). The critical limitation Congress enacted is that the affairs of the enterprise be conducted by a pattern of racketeering activity. The elements of continuity and relationship, (*H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989)), are a better check on any overuse of civil RICO than is any judicial evaluation of some amorphous degree of distinctness between separate legal entities.

Contrary to Respondents' suggestion, there is no canon of construction that supports reading a scope of employment limitation into the statute. Congress did not merely rely on common law principles or definitions. Rather it expressly defined terms, including "person" and "enterprise" to give maximum effect to the enhanced sanctions created by RICO.

B. RICO's Legislative History Does Not Support Any Limitation Based Upon Scope Of Employment

Respondents' extensive discussion of RICO's legislative history does not support their reading of Section 1962(c).[3] Like the statute itself, the legislative history makes no reference whatsoever to any distinction between the employee racketeer who operates the enterprise within or without the scope of employment. Rather, the legislative history supports the plain language of the statute that no such distinction exists.

Respondents principally focus on that legislative history addressing organized crime and then suggest that ordinary

3. The *amicus curiae* brief of the National Association of Securities And Commercial Law Attorneys in support of Petitioner contains an extensive discussion of RICO's legislative history in support of its proposition that there should be no distinctness requirement under Section 1962(c).

commercial disputes were not intended to be remedied by RICO. This Court already has rejected that argument in *Sedima*, 473 U.S. at 499, and *Turkette*, 452 U.S. at 590.

RICO is not limited to organized crime. Its reach is civil as well as criminal and the RICO "person" need not wear pinstripes and carry a Tommy gun. *See Northwestern Bell Telephone Co.*, 492 U.S. at 248-49. Moreover, contrary to Respondents' characterization, the claims alleged against Mr. King are not an ordinary commercial dispute. There is nothing normal or ordinary about the pattern of racketeering activity alleged in the complaint. If established at trial, the racketeering activity of Mr. King under the guise of the corporate enterprise, DKP, is exactly the pattern of conduct proscribed by the plain language of the statute. If, however, there is no such pattern of racketeering through which DKP's activities are conducted, then it makes no difference whether King acted within the scope of his employment; he would not be liable under Section 1962(c).

In addition to directing that RICO should be liberally construed, Congress also emphasized that RICO was intended to provide expansive remedies to achieve its far reaching objectives. *Russello v. United States*, 464 U.S. 16, 27 (1983). As this Court noted in *Russello*:

> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

Russello, 464 U.S. at 27 (quoting S. Rep. No. 91-617, at 79 (1969)).

The excerpt illustrates that RICO is directed at racketeers and the economic base through which they operate. That economic base is generically denominated as the "enterprise." It makes no difference whether the racketeer employee operates the enterprise within or without the scope of employment. The proscription is against the use of the economic base as a vehicle for racketeering in interstate commerce.

The House Report is to similar effect. With regard to Section 1962(c), the report states simply that it

> prohibits the conduct of the enterprise through the prohibited pattern of activity or collection of debt. Again, the *prohibition is without exception*. (emphasis added).

H. Rep. No. 91-1549, at 57 (1970), *reprinted in* 1971 U.S.C.C.A.N. 4007, 4033.

Had Congress intended any statutory element based upon whether the employee acted within the scope of employment, Congress would have written the statute that way. It did not. *Russello*, 464 U.S. at 23. The distinctness inherent in Mr. King being an individual employee and DKP being a corporate entity fully satisfies any distinctness requirement which may be inferred from the statute. No further analysis is required. *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Russello*, 464 U.S. at 20.

II. RESPONDENTS IGNORE CONTROLLING PRECEDENT FROM THIS COURT

Respondents essentially ignore the decisions of this Court in *United States v. Turkette*, 452 U.S. 576 (1981); *Reves v. Ernst & Young*, 507 U.S. 170 (1993); and *National Org. for Women v. Scheidler*, 510 U.S. 249 (1994). Without analysis of those cases, Respondents conclude only that the precise holdings of those cases did not decide the issue presented by this writ, and that the Third Circuit's analysis of those cases in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995) was incorrect. (Res. Br. at 37-38) The Third Circuit in *Jaguar Cars* did not err. Unlike Respondents, it considered and gave credence to the clearly expressed rationale of this Court's holdings in those cases — that an employee who operates or manages the affairs of a corporate employer so that it becomes the vehicle for racketeering activity may be liable for RICO violations under Section 1962(c). The artifice of scope of employment is not a relevant inquiry.

This Court already has established the following principles: (i) Section 1962(c) applies both to legitimate enterprises that have been infiltrated and to wholly-illegitimate enterprises whose principal purpose is economic gain by means, in whole or in part, of racketeering activity (*United States v. Turkette*, 452 U.S. 576 (1981)); (ii) the "enterprise" may be either the victim or the actual vehicle of racketeering activity (*National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994)); and (iii) the focus of Section 1962(c) is on those persons who have the ability to operate or manage the affairs of the enterprise (*Reves v. Ernst & Young*, 507 U.S. 170 (1993)). In those and other cases, this

Court has refused to limit the broad reach of the statute and has rejected arguments that the statutory sweep captures too many potential defendants.

The *stare decisis* effect of those decisions has "special force" in statutory interpretation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998). Those decisions leave no room for a judicially imposed limitation on the scope of Section 1962(c) based upon the alleged RICO person's scope of employment.[4] Nevertheless, the position adopted by the Second Circuit in this case insulates the very group of persons found in *Reves* to be appropriate defendants under Section 1962(c).

III. RESPONDENTS' RELIANCE ON PRINCIPLES OF AGENCY LAW AND THE *COPPERWELD* DECISION IS MISPLACED AND CRUMBLES ON A FAULTY PREMISE

Rather than giving credence either to the plain language of the statute or to this Court's prior decisions, Respondents seek (i) to turn agency principles inside-out; and (ii) to apply the holding in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) to a different body of jurisprudence, to which, by this Court's explicit rationale in *Copperweld*, it is not applicable.

In each instance, Respondents' arguments rest on a faulty premise: that because corporations are creatures of the state,

4. Congress has not, since the date of said decisions, amended RICO to adopt the scope of employment limitation urged by the Second Circuit. Congress has, however, amended RICO in other ways, notably in eliminating securities fraud as a predicate act for civil RICO. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737, Section 107.

which necessarily conduct their affairs through the actions of creatures of flesh and blood, corporations have no separate existence and instead merge into the personae of their employees and others who act on their behalf. The premise is laced by threads of language taken out of context and so flimsy that they simply cannot be tied or woven together in the way Respondents would like. It is self-evident that the premise has no applicability to a public company, or even to a large privately-held company. Such enterprises plainly have a separate existence independent of the identity of employees who come and go. The tautology that corporate action is undertaken by and through such individual employees does not lessen the separate existence of the corporate entity. A corporate officer may execute a contract, with actual or only apparent authority, yet it is the corporation that is bound, not the individual.

A corporation, although it may only act through its officers and employees, nevertheless remains at all times a separate legal entity, with separate rights and liabilities. *See* 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 25, at 471 (rev. vol. 1999) ("... the corporation is an entity distinct from the shareholders or members and with rights and liabilities not the same as theirs individually and severally."). That the corporation is owned by a single shareholder does not change the rule. *Id.* § 25.10, at 486.

State law, through limited liability provisions, encourages the use of the corporate form to perform a wide scope of activities, including capital-raising, investment and commercial development, and to further public goals that an individual natural person could not accomplish. The breadth of commercial activity in interstate commerce would be

prohibitively inefficient, if not impossible to undertake, without the modern corporation. *See Hale v. Henkel*, 201 U.S. 43, 76 (1906) ("Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprise.").

The corporation's separate existence is manifest throughout the law. A corporation may sue and be sued, buy and sell property, and enter into contracts, including contracts with its own shareholders, all as a separate legal entity. A corporation exists perpetually, long after the end of the natural lives of its shareholders.

As the corporation is created by the state, it may be punished by the state as well. A corporation may commit torts and commit crimes, and may be separately liable from its shareholders and employees. Indeed, the doctrines of "piercing the corporate veil," by which the corporate form is disregarded, but not extinguished, and liability is attached to the individual members who perpetrate a crime or fraud, and *respondeat superior*, by which a corporation is liable for the acts of its individual employees, both recognize the essential separateness of the corporation. These legal doctrines would be superfluous if a corporation and its members were one and the same. The natural consequence of Respondents' argument is that liability would simply attach directly to the individual, in a veil-piercing case, or directly to the corporation, in a *respondeat superior* case, without analysis or limitation. Mr. King, who invoked the shield by means of incorporating, cannot selectively disregard it.

Respondents' premise also is contrary to the specific language of RICO, which defines an enterprise as including a "corporation" without qualification. 18 U.S.C. § 1961(4).

Just as the statute is silent as to whether that employee acts within the scope of authority, it is silent as to the nature and type of corporate enterprise. Whether big or small, public or private, having many employees or few, profit or not-for-profit, all are irrelevant considerations.[5] This flaw is made no less fatal by Respondents' misplaced reliance on principles of agency and the holding in *Copperweld*.

A. DKP Misapprehends The Application Of The Agency Principles On Which They Rely

Respondents' dissertation on scope of employment and circumstances when the master may be liable for the acts of the employee agent do not support the proposition that the corporate employer is indistinct from the employee.[6] Rather, those agency principles, as well as the case law cited by Respondents, have a very different purpose. As most evident from the doctrine of *respondeat superior*, which encompasses the fiction that the act of "the servant is the act of the master," Restatement (Second) of Agency (1957) § 219 comment (1)a, the rationale of imposing liability on the master-principal, is not that the master and servant are indistinct, but rather

5. There is no suggestion here that DKP does not have the usual attributes of any other corporation chartered by state law.

6. Respondents' argument is difficult to discern. It seems to be (i) that employers are held vicariously liable for acts of employees done within the scope of employment; and (ii) that RICO does not impose vicarious liability on the enterprise. Therefore, Respondents conclude, an employee acting within his or her scope of employment cannot be liable under RICO. That syllogism is illogical. Among other fallacies, the imposition of vicarious liability under agency principles, or otherwise, does not arise because of any lack of distinctness between the employer and the employee. Vicarious liability is imposed despite such distinctness.

reflects a public policy to impose vicarious liability on the employer and thereby reduce the risk of loss on the hapless victim.

Thus, at common law, and as set out in the Restatement (Second) of Agency ("Restatement"), a master is liable for the torts of his servants both acting within the scope of their employment, Restatement § 219(1), and in some circumstances, even when the servants act outside the scope of their employment, Restatement § 219(2). *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 755-65 (1998). Critical here, however, is the fact that the servant or agent always remains liable in his or her own right. Agency and principal liability doctrines expand liability, they do not contract it as Respondents suggest.

The concept of "scope of employment" is not the shibboleth that Respondents suppose. It is a "highly indefinite phrase," and "is obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found expedient to charge the master with liability[.]" W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keaton on the Law of Torts* at 502 (5th ed. 1984); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

The definition of "scope of employment" has expanded to include acts that in no way were perpetrated to serve the employer, including criminal acts, and this is consistent with the "modern justification" of vicarious liability, as "a deliberate allocation of risk." William L. Prosser, *Handbook of the Law of Torts* at 459 (4th ed. 1971); *see also*, Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* § 26.8, at 40-41 (2d ed. 1986) (stating that the "integrating principle" of *respondeat*

superior is "that the employer should be liable for those faults that may be fairly regarded as risks of his business, whether they are committed in furthering it or not.").

The rejection of vicarious enterprise liability under 1962(c) is not to the contrary. To hold the RICO enterprise vicariously liable would not comport either with the legislative history of RICO, or with *Turkette* and *Scheidler*. The enterprise may be the passive victim of the infiltrator or the vehicle for the RICO person's racketeering activity, but in either case, vicarious liability has no role to play. Instead, the aim of Section 1962(c) is to hold liable the "person" who conducts the affairs of the enterprise through a pattern of racketeering activity.

Like the Respondents, the Second Circuit got it backwards. In *Riverwoods Chappaqua Corp. v. Marine Midland Bank, NA*, 30 F.3d 339 (2d Cir. 1994) and *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998) the Second Circuit dismissed claims that a corporation violated Section 1962(c) by reason of conducting the affairs of associations in fact consisting of itself and its employees (*Riverwoods*) and itself and subsidiary companies (*Discon*). This case, where Mr. King was identified as the RICO "person" and the corporation, DKP, identified as the "enterprise," requires a different analysis. Here, no liability is sought to be imposed upon the employer under Section 1962(c), but only upon the actor himself. There is no issue here of vicarious liability. Moreover, unlike *Riverwoods*, where the court's rationale was that the employer and its employees were not an "association in fact" different from the employer itself, here the person and the enterprise are separately identifiable legal beings.

Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129 (5th Cir. 1987), relied on by Respondents, is not to the contrary. There the court found that the corporate defendant was not liable for the criminal acts of an employee outside the scope of his employment. Clearly, however, and as Respondents concede, the employee was liable. Moreover, an employee who commits a criminal act would have no defense that the criminal conduct was within the scope of his or her employment, *United States v. Wise*, 370 U.S. 405 (1962). Neither does Mr. King. Just as Mr. Wise was liable for antitrust violations on behalf of his corporate employer, so is Mr. King subject to RICO liability under Section 1962(c), regardless of whether his activities were on behalf of the corporate enterprise whose affairs he conducted. As this Court stated in *Wise*:

> No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion; else the fines established by the Sherman Act to deter crime become mere license fees for illegitimate corporate business operations.

United States v. Wise, 370 U.S. at 409; *see United States v. Dotterweich*, 320 U.S. 277 (1943).

B. This Court's Holding In *Copperweld* Is Not Relevant Here

In *Copperweld*, 467 U.S. 752 (1984), this Court held that a corporate parent and its wholly-owned subsidiary could not be subjected to liability for conspiracy under Section 1 of the Sherman Act. 15 U.S.C. § 1. For purposes of Section 1 of the Sherman Act, this Court rejected the theory of

"intra-enterprise conspiracy."[7] That case provides no comfort or support to Respondents.

RICO and the Sherman Act are different statutory schemes driven by different policy considerations. In *Copperweld* this Court identified the Sherman Act as being premised on the "basic distinction between concerted and independent action." *Copperweld*, 467 U.S. at 767. The essential policy considerations underpinning the Sherman Act, as discussed in *Copperweld*, 467 U.S. 767-78, simply do not apply to RICO. *Haroco v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 403 n.22 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).

As stated in *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989):

> Since a subsidiary and its parent theoretically have a community of interest, a conspiracy "in restraint of trade" between them poses no threat to the goals of antitrust law — protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing infiltration of legitimate businesses by racketeers and separating racketeers from their profits. (citations omitted).

The Ninth Circuit reached the same result in *Webster v. Omnitrition Intern., Inc.*, 79 F.3d 776, 787 (9th Cir. 1996).

Copperweld reflects the statutory scheme of the Sherman Act, which proscribes concerted activity of independent competitors, 15 U.S.C. § 1, and certain unilateral activity,

7. There could, however, be liability under Sherman Act Section 1 for a combination in restraint of trade between a parent and a newly acquired subsidiary, as well as liability under Sherman Act Section 2 for unilateral action.

15 U.S.C. § 2. But RICO presents a very different statutory scheme. RICO's aim is not to prevent separate entities from acting as a unitary actor, but rather it is to prevent the actor (i.e., the RICO "person") from accomplishing or benefiting from racketeering activity shrouded by the cloak of some form of "enterprise."

IV. RESPONDENTS' OWN ANALYSIS DEMONSTRATES THAT DISMISSAL ON A MOTION PURSUANT TO RULE 12(b)(6) WAS IMPROPER

Respondents mischaracterize the issue before this Court as a question of under "what circumstances a corporate employee is sufficiently 'distinct' from the corporate employer 'enterprise' to qualify as a RICO 'person' subject to RICO liability under § 1962(c)" (Res. Br. at 15). As so framed, Respondents posture a fact-intensive analysis which is dependent on what can be proved in each case. Indeed, the conclusion by the District Court and the Second Circuit that the alleged racketeering activities that Mr. King conducted through DKP were within the scope of his employment requires proof by the RICO defendant rather than presumption.[8] In the first instance, pleading legal entity distinctness is all that should be required. For this reason alone, the judgment of dismissal should be reversed and the complaint reinstated, even if the Court were to accept the incorrect rule of law adopted by the Court of Appeals below.

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8. If scope of employment were now to be a judicially created shield against liability for criminal activity, that is so contra-instinctual and so departs from established legal principle that, at the very least, the burden should be on the defendant RICO person both to plead the extenuating circumstances and to persuade that the distinctness inherent in separate legal entities should be disregarded. There should be no such burden imposed upon the victim who is a stranger to the enterprise and seeks redress.

CONCLUSION

For the reasons set forth above, and in the main brief of Petitioner, the judgment below should be reversed and the matter remanded to the Court of Appeals for the Second Circuit with instructions that the complaint be reinstated, and the matter remanded to the United States District Court for the Southern District of New York for further proceedings.

Respectfully submitted,

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